



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

APR 30 2004

OFFICE OF  
CIVIL RIGHTS

**CERTIFIED MAIL #7004-2510-0004-2241-7708**  
**RETURN RECEIPT REQUESTED**

**In Reply Refer to:**  
EPA OCR File No. 01R-03-R10r

Mr. Christopher Winter  
Cascade Resources Advocacy Group  
917 SW Oak, Suite 417  
Portland, OR 97205

**CERTIFIED MAIL #7004-2510-0004-2241-7715**  
**RETURN RECEIPT REQUESTED**

Mr. Ted Gathe  
Office of City Attorney  
City of Vancouver  
P.O. Box 1995  
Vancouver, WA 98668-1995

**Re: LETTER OF CONCERN – EPA FILE NO. 01R-03-R10r**

Dear Mr. Winter, and Mr. Gathe:

On December 13, 2003, and January 14, 2004, the Rosemere Neighborhood Association (RNA or Complainant) filed two letters that formed the basis of an administrative complaint. The complaint, filed with the U.S. Environmental Protection Agency (EPA) Office of Civil Rights (OCR), alleged a violation of EPA's regulations implementing Title VI of the Civil Rights Act of 1964 (Title VI), as amended, 42 U.S.C. §§ 2000d *et seq.* Specifically, the complaint alleged that the City of Vancouver (City or Recipient) revoked RNA's official status as a neighborhood association in retaliation for RNA previously filing an administrative Title VI complaint with EPA.

This letter and the accompanying Investigation Report (IR) constitute OCR's finding under Title VI and 40 C.F.R. Part 7, and EPA's dismissal of the administrative complaint. OCR's findings, as well as the legal and factual bases for those findings, are set forth in detail in the IR.

While EPA is dismissing this complaint, the investigation raised concerns about the City's previous compliance with the procedural requirements that must be implemented by all

recipients and sub-recipients of EPA financial assistance.<sup>1</sup> A discussion about those requirements is included in this letter, along with recommendations on how to improve communication between residents in neighborhood associations.

## I. COMPLAINT PROCESS

On February 20, 2003, RNA filed an administrative complaint with OCR.<sup>2</sup> In that complaint, RNA alleged that the Development Review Services (DRS) department in the City of Vancouver violated Title VI and EPA's Title VI implementing regulations by granting a preliminary building approval for a proposed ten-unit residential development project.<sup>3</sup> OCR rejected the complaint by letter dated May 23, 2003, because EPA determined that DRS was not a financial recipient of EPA. Therefore, OCR did not have jurisdiction to investigate the complaint.<sup>4</sup> On December 13, 2003, and January 15, 2004, RNA filed two letters forming the basis of an administrative complaint.<sup>5</sup> The complaint stated that the City of Vancouver withdrew formal recognition of RNA, as a neighborhood association, in retaliation for having filed its earlier administrative complaint with EPA.<sup>6</sup>

EPA's nondiscrimination regulations prohibit any applicant, recipient, or other person from retaliating against any individual or group because they have previously filed an administrative complaint.<sup>7</sup> OCR reviewed the complaint pursuant to EPA's Title VI implementing regulations found at 40 C.F.R. § 7.120. OCR accepted this administrative complaint for investigation by letter dated August 16, 2005, because the complaint satisfied the jurisdictional criteria for acceptance in EPA's regulations.<sup>8</sup> Specifically, the complaint was in writing, described an act that violated EPA's Title VI regulations (*i.e.*, retaliation for filing a prior complaint under 40 C.F.R. Part 7), and was filed within 180 days of the alleged retaliation.<sup>9</sup>

## II. BACKGROUND

The City of Vancouver is a public agency within the State of Washington.<sup>10</sup> Within the City, an office exists that works with numerous neighborhood associations. The City's Office of

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<sup>1</sup> See 40 C.F.R. §§ 7.85, 7.90, 7.95.

<sup>2</sup> Letter from Dvija Michael Bertish, Chairman, RNA, to Yasmin Yorker OCR (Feb. 20, 2003); e-mail from Dvija Michael Bertish, RNA, to Yasmin Yorker, OCR, re: Title VI and Environmental Justice Complaints (Feb. 20, 2003); Letter from RNA to Kristina Miller, Supervisor of Complaint Intake, U.S. Dept. of Housing and Urban Development re: Title VI and Environmental Justice Complaints in Vancouver, WA (Feb. 18, 2003).

<sup>3</sup> Letter from Karen D. Higginbotham, Director, OCR, to Dvija Michael Bertish, Chairman, RNA (May 23, 2003).

<sup>4</sup> *Id.*

<sup>5</sup> Letter from Dvija Michael Bertish, RNA, to Monica Kirk, U.S. EPA, (Dec. 13, 2003); Letter from Dvija Michael Bertish, Chairman, RNA, to U.S. EPA, OCR (Jan. 15, 2004).

<sup>6</sup> *Id.*

<sup>7</sup> See 40 C.F.R. § 7.100.

<sup>8</sup> See fn. 3.

<sup>9</sup> Intimidation and retaliation by any applicant for EPA assistance, recipient of EPA assistance, or other person is prohibited. 40 C.F.R. § 7.100.

<sup>10</sup> Letter from Ted H. Gathe, City Attorney, Vancouver, Washington, to Mike Mattheisen, OCR, EPA (Sept. 15, 2005).



Neighborhoods “provides City residents, City Council and staff with responsive, coordinated services that promote and support collaboration and communication among residents and City government through recognized neighborhood associations.”<sup>11</sup> The City of Vancouver first enacted a neighborhood association ordinance in 1975, and the City now recognizes over sixty neighborhood associations.<sup>12</sup>

RNA is a volunteer organization. It was incorporated as a City-sanctioned association in 1979, and became a registered non-profit (501(c) (3)) in 2001.<sup>13</sup> RNA is “dedicated to uniting the common interests and promoting the welfare of the neighborhood and its residents by serving as a model of diversity and open mindedness.”<sup>14</sup> RNA’s stated mission is to work together to create an atmosphere of peace, pride, and security, encourage participation of all residents, prohibit discrimination, and promote and encourage environmental awareness and preservation in the Rosemere community. Each year, officers and board members are nominated in March, elected in April, and assume office in May.

### III. DESCRIPTION OF OCR’S INVESTIGATION

OCR conducted its comprehensive information gathering and investigation in accordance with the U.S. Department of Justice (DOJ) Investigation Procedures Manual.<sup>15</sup> In conducting the investigation, OCR collected documents from the recipient, the complainant, and electronic databases. OCR conducted a telephone interview with members of RNA on January 23, 2006. On May 23 and 24, 2006, OCR traveled to Vancouver, Washington, and conducted in-person interviews of the City Attorney for the City of Vancouver, the former coordinator of the Office of Neighborhoods for the City of Vancouver, a Vancouver City Councilmember, and six members of RNA. OCR’s investigation was also based on a review of the administrative record and other materials obtained from public sources.

### IV. DESCRIPTION OF OCR’S ANALYSIS

OCR’s analysis of a retaliation complaint is drawn from *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) (setting forth evidentiary burdens for proving disparate-treatment claim by circumstantial evidence), and other discrimination case law.<sup>16</sup> As applied in the context of an administrative retaliation complaint, *McDonnell Douglas* sets forth a three-part test for establishing a violation. First, there must be a *prima facie* claim of retaliation. Second, if a *prima facie* retaliation claim exists, the burden shifts to the alleged retaliator to articulate a legitimate, nonretaliatory reason (*i.e.*, justification) for its actions. Third, if the alleged retaliator meets its justification burden, the record must establish whether the articulated justification was a

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<sup>11</sup> *Id.*

<sup>12</sup> See fn. 10.

<sup>13</sup> <http://www.rosemerena.org>.

<sup>14</sup> <http://www.rosemerena.org/about.php>.

<sup>15</sup> See US Department of Justice *Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes*. (September 1998)

<sup>16</sup> See, e.g., *Baldwin v. Univ. of Texas*, 945 F. Supp. 1022, 1031 (S.D. Tex. 1996); *Brantley v. Indep. Sch. Dist. No. 625, St. Paul Pub. Sch.*, 936 F. Supp. 649, 658 n. 17 (D. Minn.1996).

pretext for retaliation and whether a retaliatory motive was behind the adverse action.<sup>17</sup>

#### IV. FINDINGS

Based upon the evidence gathered and reviewed, OCR has determined that a *prima facie* case of retaliation has been established. OCR has also determined that the City articulated legitimate, nonretaliatory reasons for its actions. While OCR found the timing of the City Attorney's investigation into concerns about RNA suspicious, OCR has concluded that the evidence did not demonstrate that it was more likely than not that RNA's filing of its February 2003 Title VI complaint "actually motivated" the City's January 12, 2004, decision to withdraw formal neighborhood association recognition of RNA.

#### VII. CONCLUSION

The traditional rule is that to make a finding of retaliation, a fact finder must be satisfied that retaliation for engaging in prior protected activity "actually motivated" the adverse action.<sup>18</sup> Upon review of the materials submitted and information gathered during its investigation, as well as controlling legal authority, OCR has not found a violation of Title VI nor EPA's implementing regulations. OCR's investigation revealed that the Vancouver City Council revoked RNA's neighborhood association status on January 12, 2004, because of the substantive concerns listed in the City Attorney's April 21, 2003, memorandum, in the City's January 12, 2004, staff report to the City Council, and in the City's September 15, 2005, letter to OCR. The investigation also revealed that because RNA failed to provide sufficient, timely responses, by October 31, 2003, to the corrective recommendations stated in the City Attorney's April 21, 2003, memorandum and to the City Manager's September 29, 2003, letter, the City's articulated reasons for withdrawing RNA's formal neighborhood association recognition are worthy of credence. Therefore, EPA is dismissing this complaint.

#### VIII. RECOMMENDATIONS

Although EPA is dismissing this complaint, the investigation raised concerns about the City's previous compliance with the procedural requirements that must be implemented by all recipients and sub-recipients of EPA financial assistance. Specifically, it does not appear that the City had a grievance process that complies with EPA's nondiscrimination regulations.<sup>19</sup> While OCR recognizes that the City is not currently a direct recipient of EPA financial assistance, OCR encourages the City of Vancouver to:

- Establish grievance procedures to resolve discrimination complaints (non-employment-

<sup>17</sup> *Mayfield v. Hart County Sch. Dist.*, No. 3:04-CV-09 (CDL), 2006 WL 1652299, slip op. at \*7 (M.D. Ga. June 9, 2006).

<sup>18</sup> See *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993) (intentional-employment-discrimination case based on age).

<sup>19</sup> See 40 C.F.R. §§ 5.135(b), 7.85, 7.90(a).



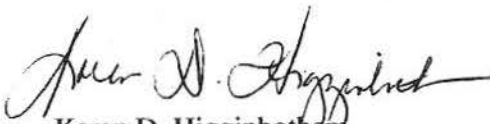
related) filed by members of the public.<sup>20</sup>

- Provide notice in a prominent place in the City's offices that it does not discriminate on the basis of race, color, national origin, disability, sex, or age in the administration of City programs.<sup>21</sup>

OCR strongly believes that if the City had a grievance process pursuant to EPA's implementing regulations, there may have been an opportunity for meaningful communication between the City and RNA. OCR also recommends that the City of Vancouver review EPA's *Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance)*.<sup>22</sup> The Recipient Guidance discusses various approaches and suggests tools recipients may use to help enhance public involvement. A copy of the Recipient Guidance is enclosed.

If you have any questions, please contact Yasmin Yorker, Assistant Director of the OCR External Compliance Program, by telephone at (202) 343-9682, or by mail at U.S. EPA, Mail Code 1201A, Washington, D.C., 20460-0001.

Sincerely,

  
Karen D. Higginbotham  
Director

Enclosures

cc: Mr. Dvija Michael Bertish  
P.O. Box 61471  
Vancouver, WA 98666

Stephen G. Pressman, Associate General Counsel  
Civil Rights & Finance Law Office (MC 2399A)

Robert Hartman, Title VI Coordinator  
EPA Region 10

<sup>20</sup> See 40 C.F.R. § 7.90.

<sup>21</sup> See 40 C.F.R. § 7.95(a).

<sup>22</sup> See 71 Fed. Reg. 14207. (March 21, 2006) (Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs (Recipient Guidance))